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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 655

WILLIAM PEARLMAN, WILLIAM BLANK, BLAIR BROWN and LEONARD COHEN, *Petitioners,*

v.

STATE OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
The Raising of the Federal Questions	11
Reasons for Granting the Writ	13
Conclusion	20
Appendix A—Indictment	A.1
Appendix B—Opinion and Judgment Below	A.4

Cases Cited

Bannon v. United States, 156 U.S. 464	17
Cole v. Arkansas, 333 U.S. 196	14, 18
De Jonge v. Oregon, 299 U.S. 353	18
Hodgson v. Vermont, 168 U.S. 262	13, 14
Kepl v. United States, 299 Fed. 590	18
Kotteakos v. United States, 328 U.S. 750	18
Larkin v. United States, 107 Fed. 697	17
Lauer v. United States, 320 F. 2d 187	17
Pearlman v. State, 232 Md. 251, 192 A.(2d) 767	1
Russell v. United States, 369 U.S. 749	19
United States v. Cruikshank, 92 U.S. 542	15
United States v. Hess, 124 U.S. 483	15

Constitutions, Statute and Rules

U. S. Constitution, Fourteenth Amendment	2, 11, 12, 13
Art. 21, Maryland Declaration of Rights	11, 13
28 U. S. C. 1257(3)	2
Federal Rules of Criminal Procedure, Form 3	15
Maryland Rules of Procedure (1961) ed.:	
Rule 850	2
Rule 522b	12

Articles

Sayre, Criminal Conspiracy, 35 Harv. L. Rev. 393	13
Scott, Fairness in Accusation of Crime, 41 Minn. L. Rev. 509	18

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Petitioners, William Pearlman, William Blank, Blair Brown and Leonard Cohen, pray for a writ of certiorari to review a judgment of the Court of Appeals of Maryland which affirmed a judgment of the Criminal Court of Baltimore convicting petitioners of the common-law crime of conspiracy.

OPINION BELOW

The opinion of the Court of Appeals of Maryland (R. 118; Appendix B, *infra*) is reported at 232 Md. 251, 192 A. (2d) 767.

JURISDICTION

The judgment and opinion of the Court of Appeals of Maryland (Appendix B, *infra*) was entered and filed on July 12, 1963 (R. 118). A timely motion for reargument was filed on August 8, 1963 (R. 136), pursuant to Rule 850 of the Maryland Rules of Procedure (1961 ed.), which permits the filing of such motions within thirty days after the filing of the opinion of the court. The motion for reargument was denied on September 9, 1963 (R. 141).

The jurisdiction of this Court is conferred by 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether petitioners were denied due process of law in violation of the due process clause of the Fourteenth Amendment to the United States Constitution because they were not adequately informed of the accusations against them, the charges being no more definite than that petitioners had engaged in a common-law criminal conspiracy to wrong persons with whom they might have business dealings.

2. Whether petitioners were denied due process of law by being convicted of an offense with which they were not charged.

STATEMENT OF THE CASE

During the period charged in the indictment (R. 45-47; Appendix A, *infra*)—i.e., from February 19, 1957 to September 10, 1959—petitioners were engaged in the business of selling home improvements to home owners, principally through a corporation known as Reynolds Engineering & Supply Co., Inc. Petitioner William Pearlman was president of Reynolds. Peti-

tioner William Blank was its secretary-treasurer. Petitioner Leonard Cohen was its credit manager from August 1958 on. Petitioner Blair Brown was sales-manager from April 30, 1959 to August 6, 1959. Between October 1956 and November 1959, the Reynolds Company processed more than 2,500 sales. The sales were generally made on credit, the purchaser executing an installment note secured by a second mortgage on the real property being improved. The notes were discounted for Reynolds by financial institutions, to whom Reynolds assigned the loan papers with recourse. (R. 68-69, 76, 120.)

On September 10, 1959, a two-count indictment (R. 45-47, 6; Appendix A, *infra*) was returned by the grand jury for the city of Baltimore naming the four petitioners and seventeen other individuals as defendants. Each count recited that the defendants were engaged, under various company names, "in the business of general home repairs and improvements, and in the sales of goods, wares, merchandise and chattels, and in the financing thereof" in Baltimore on February 19, 1957. The first count thereafter alleged nothing more than that from February 19, 1957 to the return date, the defendants conspired "by wrongful and indirect means and divers false pretenses and other false and subtle means and devices to cheat, wrong, defraud and impoverish" all persons who were or might become their customers, stockholders, or financing institutions.[1] The second count thereafter alleged

[1] Following the recitation as to the nature of the defendants' business on February 19, 1957, the first count alleged in toto that the defendants:

> "thence continuously thereafter to and including the date of the finding of the indictment in this case at the City of Baltimore aforesaid, did wrongfully and unlawfully conspire, com-

nothing more than that the accused conspired for the same period and by the same means to obtain "certain properties" of the same intended victims with the intent "fraudulently and maliciously to cheat, wrong, defraud and impoverish" the latter.[2]

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bine, confederate and agree together, and with each other and with others to the jurors aforesaid unknown, by wrongful and indirect means and divers false pretences and other false and subtle means and devices to cheat, wrong, defraud, and impoverish, their customers, stockholders, patrons, and financial institutions, financing home improvements having contractual relations with them, and such other members of the public, corporations, and financial institutions, as might become customers or stockholders or have business dealings with them, of certain properties, moneys, goods, and chattels, then and there the property of their said customers, stockholders, patrons, and financial institutions having contractual relations with them, and such other members of the public, corporations, and financial institutions as might become customers or stockholders or have business dealings with them, to the great damage and injury of said customers, patrons, stockholders, financial institutions, corporations and members of the public to the evil example of all others in like manner offending and against the peace, government and dignity of the State." (R. 46; Appendix A, *infra.*)

[2] Following the recitation as to the nature of the defendants' business on February 19, 1957, the second count alleged in toto that the defendants:

> "thence continuously thereafter to and including the date of the finding of the indictment in this case, at the City of Baltimore aforesaid, did wrongfully and unlawfully conspire, combine, confederate and agree together, and with each other and with others to the jurors aforesaid unknown, by wrongful and indirect means and divers false pretences and other false and subtle means and devices to obtain and acquire for themselves certain properties, moneys, goods and chattels, then and there the property of their customers, patrons, and financial institutions financing home improvements having contractual relations with them, the stockholders of said corporations, and such other persons, corporations and financial institutions, as

The indictment was not laid under any statute, nor did it allege a conspiracy to commit a statutory offense. As the trial court held (R. 56), the accusation was of a common-law conspiracy, an offense which is still recognized under Maryland law.

Petitioners moved to dismiss the indictment as being vague and indefinite and also moved for bills of particulars and to require an election of counts (R. 48-52). The trial court, the Criminal Court of Baltimore, denied the motions (R. 62, 64, 66).

In an accompanying opinion (R. 54-66), the trial court pointed out that Maryland recognizes two kinds of criminal conspiracies: (1) agreements to accomplish wrongful (but not necessarily illegal) objectives and (2) agreements to use wrongful means to effectuate non-wrongful objectives (R. 56). The opinion vacillated as to which kind of conspiracy was alleged and as to whether the indictment charged one or more conspiracies. At several points, the opinion placed the conspiracy within the wrongful-objective category, describing it as one to cheat and defraud persons of property, and held that the means allegations were surplusage (R. 56, 57, 58). The opinion also held

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might become customers or have business dealings with them, with the intent then and there fraudulently and maliciously to cheat, wrong, defraud, and impoverish their said customers, patrons, and financial institutions having contractual relations with them, the stockholders, actual and potential, of said corporations, and such other persons, corporations, financial institutions and others to the said Jurors unknown as might have business dealings with them to the great damage and injury of said customers, patrons, stockholders, financial institutions, persons and corporations, to the evil example of all others in like manner offending and against the peace, government and dignity of the State." (R. 47; Appendix A, *infra*.)

that the indictment alleged "only one conspiracy to victimize several separate classes of persons" (R. 62), and that "the two counts merely charge the same offense in different ways" (R. 66). But at other points the opinion described the indictment as charging "a conspiracy by wrongful and indirect means and divers false pretenses varying only in the alleged object or purpose to be accomplished by the conspiracy" (R. 55, 65).

Petitioners and two other defendants, Jerome Glass and Albert Greenberg, elected to be tried by the court without a jury. After a trial of twenty-eight days, recorded in a transcript of 4287 pages,[3] the court found petitioners and Glass guilty and acquitted Greenberg (R. 83).

The court issued an opinion in support of its verdicts (R. 67-83). Therein it adopted the "means" category for the offense, stating (R. 67):

> "Both counts charge a conspiracy by wrongful and indirect means and divers false pretenses, varying only in the alleged object or purpose to be accomplished by the conspiracy."

Although the opinion summarizes some of the evidence and is studded with references to "the illegal plan," "the conspiracy," and "this crime" (R. 69, 76, 77), it nowhere states what it was that the defendants agreed on that constituted the found conspiracy. It is reasonable to infer from some of the passages, however, that the found conspiracy included, but was not limited to, an agreement to overcome customer reluctance to execute second mortgages by concealing from them,

[3] The trial transcript is included in the original record, which has been filed with the Court in addition to the certified record.

until the jobs were under way, that second mortgages were among the documents they signed (R. 75-76, 78). This inference is confirmed by the subsequent opinion of the Court of Appeals, which stated (R. 122-123; emphasis supplied):

> "In its trial memorandum, the court, in speaking of the unlawful means employed to carry out *the unlawful object* of the conspiracy, found, *among other things*, that the five defendants who appealed had formulated a scheme to overcome the general reluctance of customers to execute mortgages for home improvements by inducing them to sign blank forms which they did not know were mortgages; that home improvements had been sold and mortgages fraudulently obtained from customers 'by concealment, trickery and misrepresentation'; that when the defendants had a legal obligation to speak, they 'spoke falsely'; and that the signing by customers of blank mortgages had 'facilitated the operation of the illegal plan and its objectives,' and entered verdicts of guilty against each of the defendants."

The "other things" found and the nature of "the unlawful object of the conspiracy" cannot be ascertained from the trial court's opinion or from the opinion of the Court of Appeals.

Petitioners testified at the trial and produced other witnesses (R. 73, 129). The defense case included evidence contradicting, both directly and circumstantially, prosecution testimony that the defendants had concealed and agreed to conceal from customers the fact that the latter were signing second mortgages (R. 73-75, 129). But the defense also introduced other evidence in attempted refutation of the indictment's general allegations of a scheme to wrong the public. For example, among the subjects covered by the direct testi-

mony of the first defense witness, petitioner William Pearlman, were the following: the adequacy of the consideration for the corporate stock issued to the management of the Reynolds Company (Trial Tr. 2249-53, 2281); whether a public stock issue violated the blue sky laws or was offered on unfair terms (Trial Tr. 2257-58, 2278-81); the Company's practices in obtaining financing from lending institutions and protecting their lenders against defaults on the loan securities (Trial Tr. 2263-78, 2287-95); the Company's dividend practices (Trial Tr. 2282-87); the exclusion of unearned carrying charges from a prospectus description of assets (Trial Tr. 2387-91); the use of various trade names (Trial Tr. 2339-2404).

No one at the trial considered this testimony to be irrelevant. On the contrary, it was admitted without objection or question, and the state cross-examined on some of the topics (Trial Tr. 2478-90, 2494-99, 2500-03, 2507-08).

Because some of the customers called as prosecution witnesses had denied their purported signatures to mortgage documents, the defense produced expert handwriting testimony that the signatures were genuine (R. 74; Trial Tr. 4100-19). The testimony was admitted without question or objection. After the trial, the defense learned from the trial judge's opinion that despite "the suggestion made by some witnesses that their signatures had been forged . . . the State's case is not based on the theory of forgery" (R. 74). The basis for this conclusion by the trial court does not appear, nor is there any way of knowing whether the State's case would have included "the theory of forgery" if the expert testimony had not been introduced.

The trial court sentenced petitioner Pearlman to five years' imprisonment, petitioner Blank to four years' imprisonment, and petitioners Leonard Cohen and Blair Brown to a fine of $2,000 each (R. 45).[4]

Petitioners appealed to the Court of Appeals of Maryland. The State's brief on appeal took different views of the nature of the crime, depending on the contention it was seeking to refute. In defending the indictment against the claim of vagueness, the State argued that the crime charged was a conspiracy to effectuate an illegal objective—i.e., to defraud—and the means were not an element of the offense. It said (R. 92; emphasis in original):

> "The indictment here need state only the conspiracy and its object. The *means* by which the conspiracy was intended to be accomplished are matters of evidence."

But in contending that there had been no variance between the indictment and the findings, the State's brief took the opposite view, stating (R. 99-100):

> "It was the illegal methods and means by which these Appellants in combination operated to cheat and defraud which were the nub of the offense charged and proved. . . . And arguendo, even if the trial court had found, in its pre-trial memo, as Appellant suggests, that the conspiracy was one calculated to achieve an unlawful objective, this court could disregard such ruling, if it found, upon examination of the indictment, that such was not the case, as distinguished from the trial court's finding of fact as to the nature of the conspiracy found, upon all of the evidence. Stated differently, this court could find that the indictment alleged a conspiracy to effect a lawful objective

[4] The other convicted defendant, Jerome Glass, was sentenced to eighteen months imprisonment (R. 45).

by illegal means, even if the trial court had not so found."

In affirming the conviction, the majority of the Court of Appeals held that the indictment charged both kinds of conspiracy (R. 123-24, 130-31) and that it was not unconstitutionally vague because, "While the means are not spelled out, the indictment is otherwise reasonably clear and certain" (R. 125-26). The court stated that it saw no reason for the trial court's refusal to require particulars (R. 128), but held that the refusal was not prejudicial error because the defendants had introduced evidence "aimed at rebutting and refuting" State testimony concerning misrepresentation in obtaining mortgages, and "it is difficult to understand what other defenses the defendants might have made (and none are shown) had they been furnished with particulars" (R. 129). The Court also stated (R. 129-30):

> "Although some irrelevant testimony was produced to defend against forgery (which the court later stated had not been charged in the indictment)[5] the defendants failed to show how they had been injured or put to any disadvantage by the refusal of the trial court to require the filing of particulars."

Chief Judge Brune dissented on the grounds that "the defendants were not adequately apprised of the nature of the charges against them" (R. 134). The dissent also stated (R. 134-35):

> "The Court recognizes that the indictment does not adequately inform the defendants of the

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[5] This is not what the trial court stated. It actually said (R. 74), "However, the State's case is not based on the theory of forgery."

charges against them by stating that the demand for a bill of particulars should have been granted (at least in part). The Court then holds that the defendants were not prejudiced in their defense by the denial of particulars because of the large number of witnesses and extensive testimony which they were able to produce even without particulars being furnished. This seems to me to amount to a holding that because the defendants knew of their own conduct and misdeeds, they were not prejudiced by not being told specifically what charges they would have to answer. That may well be true of the guilty, but it would not be true of the innocent. Such a rule would greatly hamper the innocent in the preparation and presentation of their defense and would facilitate their conviction, even if they were in fact innocent. In the event of conviction under such circumstances they would then come to an appellate court with a finding of guilt against them and with serious difficulty in showing prejudice."

THE RAISING OF THE FEDERAL QUESTIONS

The federal questions sought to be reviewed were first raised as such in petitioners' Brief in the Court of Appeals. The Brief listed as two of the Questions Presented the following (R. 89):

"1. Whether the indictment is so vague and indefinite that appellants were not adequately informed of the accusation against them, in violation of Article 21 of the Maryland Declaration of Rights and the due process clause of the Fourteenth Amendment to the United States Constitution."

"3. Whether there was such major variances between the conspiracy alleged and the conspiracy found that appellants were convicted of a crime with which they were not charged, in violation of Article 21 of the Maryland Declaration of Rights

and the due process clause of the Fourteenth Amendment."

The argument in the Brief of these issues was also in terms of the federal due process clause (R. 14-15, 34, 37-38).

The foundation for raising the federal questions in the Court of Appeals was laid by the motions to dismiss the indictment and for bills of particulars (*supra*, p. 5). The motions did not assert that the action sought was requested for federal constitutional reasons; however, under Maryland law such an assertion was not necessary to preserve the federal question for consideration on appeal to the Maryland Court of Appeals.[6] The opinion of the Court of Appeals listed petitioners' contentions as follows (R. 123):

> "On appeal, the defendants contend (i) that the indictment is so vague and indefinite that they were inadequately informed of the accusations against them in violation of the constitutional requirements; (ii) that the denial of particulars was prejudicial error; (iii) that the convictions violate the due process clauses of the state and federal constitutions because there were such variances between the conspiracy alleged and the conspiracy found that the defendants were convicted of a crime not charged; and (iv) that the evidence does not support the convictions, particularly that of the defendant Blair Brown."

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[6] Rule 522b, Maryland Rules of Procedure (1961 ed.), provides: "For purposes of reconsideration by the trial court or review on appeal, it is sufficient that a party at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, and unless requested by the court it shall not be necessary to state the grounds therefor."

In discussing the first of these contentions, the Court of Appeals stated (R. 124), "This right [to be informed of the accusation] is guaranteed by Article 21 of the Maryland Declaration of Rights and the due process clause of the Fourteenth Amendment to the Constitution of the United States." The court decided each of the listed contentions adversely to petitioners (R. 118-35; Appendix B, *infra*).

REASONS FOR GRANTING THE WRIT

1. This case establishes that in Maryland it is lawful to convict people of the archaic crime of common-law conspiracy in a Kafka-like proceeding. Under the holding below, defendants can be tried on charges which are uninformative and unintelligible to them, to the trial court, and very likely to the prosecution; even after trial, conviction, appeal and long-term imprisonment, the nature of their transgression can remain undefined. The State of Maryland has resurrected one of the oppressive conveniences of the common-law conspiracy concept—that "in cases where the actual deeds were of doubtful criminality, it saved the judges from the often embarrassing necessity of having to spell out the crime." Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393, 406.

This kind of procedure is supposed to have been eliminated by the Fourteenth Amendment, which exacts of the states the same notice of accusation which the Sixth Amendment requires in federal prosecutions. "[I]n all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him; . . . in no case can there be, in criminal proceedings, due process of law where the accused is not thus informed." *Hodgson* v. *Vermont*, 168 U.S.

262, 269. "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole* v. *Arkansas*, 333 U.S. 196, 201.

The first count of the indictment charged that from February 19, 1957 to the indicting date (September 10, 1959), petitioners and seventeen other individuals conspired with each other and persons unknown "by wrongful and indirect means and divers false pretenses and other false and subtle means and devices to cheat, wrong, defraud and impoverish" all persons who were or might become "their customers, stockholders, patrons, and financial institutions . . . having contractual relations with them." The second count charged that the accused conspired for the same period and by the same means to obtain "certain properties" of the same intended victims with the intent "fraudulently and maliciously to cheat, wrong, defraud and impoverish" the latter. (*Supra*, pp. 3-4.)

These allegations were the *only* notice to petitioners of the offense of which they were accused, their motions for particulars having been denied. All that petitioners were told, therefore, was that they had conspired over a period of two years and seven months to defraud three classes of persons, sufficiently comprehensive to include the whole world, of unspecified property, in unspecified respects, by wrongful but unspecified means. In short, petitioners were accused, in ponderous but unilluminating invective, of nothing more definite than that they had agreed to be dishonest.

The crime alleged in the indictment was, according to the Court of Appeals, an agreement to use unlawful

means to attain an unlawful objective (R. 123-24, 131). It was necessary, therefore, for the indictment to describe the agreement sufficiently to enable the accused to identify it. Illustrative of the kind of pleading that was needed is Form 3 appended to the Federal Rules of Criminal Procedure.

The Court of Appeals itself recognized (*supra*, p. 10), that the means of the alleged conspiracy was "not spelled out" by the indictment's language ("by wrongful and indirect means and divers false pretenses and other false and subtle means and devices"). Yet the verdict was based on the theory that the criminality lay in the means (*supra*, p. 6).

Moreover, the other element of the alleged crime, the conspiratorial objective, was also not intelligibly defined, it being alleged no more definitely than a purpose "to cheat, wrong, defraud and impoverish" whomever the accused might do business with. This language was nothing more than a generalized, conclusory description of the criminal area; it gave no information of the criminal conduct attributed to the accused. The Constitution requires, however, not only a "general description of an offense," but also "a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *United States* v. *Hess*, 124 U.S. 483, 487. As stated in *United States* v. *Cruikshank*, 92 U.S. 542, 558: "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.'"

The conclusive proof that the indictment did not fulfill its constitutional function of notice is that no one can anticipate from reading it that the alleged conspiracy included a scheme to conceal from customers their signing of mortgage instruments. Yet it was held—after the trial, of course—that such a plan was a part of the conspiracy, the other parts remaining undivulged.

From this indictment it was impossible for the defense to know what to expect at the trial, what to prepare for, and what to defend themselves against. The indictment did not even supply a clue to the nature of the conspiratorial agreement. If an indictment charges a conspiracy to commit murder or arson or some other identifiable substantive offense, that in itself supplies some idea of the criminal conduct alleged. The accused at least knows that he is being charged with plotting something as concrete as a slaying or a burning. But fraud, not to mention "wronging" and "impoverishing," is so elastic a concept, embracing an infinite variety of conduct, that a bare allegation of a conspiracy to defraud supplies no comparable indication of the offense.

Again, the defendants might have had some notion of the charge if the indictment had named at least some of the persons against whom the alleged conspiracy was directed, or even if it had confined itself to a single discrete class of victims, or if it had identified the deceptive methods. Since the indictment did none of these things, the defendants could prepare for trial only by assuming the impossible burden of examining and being ready to justify against unknown attack every single business transaction which they had conducted or contemplated during a period of two

years and seven months, including their thousands of consummated sales, undisclosed numbers of attempted sales, and all dealings with or involving financing institutions and stockholders.

Whatever the conspiracy was, it was an executed one, since it allegedly covered a period of a year and seven months and the State's case included testimony of alleged victims. The State was, therefore, in a position to name some, and perhaps all, of the victims. Its failure to do so in itself made the indictment unconstitutionally vague. *Lauer* v. *United States,* 320 F. 2d 187; *Larkin* v. *United States,* 107 Fed. 697.

Also compounding the vagueness of the indictment was the absence of any allegation of an overt act. Most states and the federal government have modified the common law by requiring that an overt act be alleged and proved in conspiracy cases. Maryland, however, still adheres to the pristine doctrine, as the present indictment shows. Yet simultaneously Maryland has discarded one of the ameliorating devices of the common-law courts. "At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy, and indictments therefor were of such general description that it was customary to require the prosecutor to furnish the defendant with a particular of his charges." *Bannon* v. *United States,* 156 U.S. 464, 468. The indictment here alleged no overt act and was of a more general description than any that can be found in the old English cases. By denying all particulars, the Maryland courts have showed less solicitude for defendants than the courts of a supposedly cruder age.

2. The indictment was not only uninformative; it was misleading. It alleged a conspiracy to victimize

three classes—actual and potential customers, stockholders and financing institutions. And the accused were told by the trial court's pre-trial opinion that there was only one conspiracy (*supra*, pp. 5-6). They were entitled to assume, therefore, that the fraudulent scheme was one which by its nature would victimize all three named classes. Yet the only agreement which was eventually (after trial) intelligibly defined as being part of the conspiracy was one which operated solely against customers (*supra*, pp. 6-7). Thus appellants were convicted of an offense with which they were not charged, in clear violation of due process. *De Jonge* v. *Oregon*, 299 U.S. 353, 362; *Cole* v. *Arkansas*, 333 U.S. 196, 201; *Kepl* v. *United States*, 299 Fed. 590, 591; Scott, *Fairness in Accusation of Crime*, 41 Minn. L. Rev. 509, 519. Cf. *Kotteakos* v. *United States*, 328 U.S. 750.

3. After trial, conviction and affirmance on appeal, there still remains unidentified the culpable conduct for which petitioners are to be imprisoned and fined. By crediting contradicted prosecution testimony, the trial court apparently found that the crime included *in part* a scheme to conceal temporarily from customers their signing of mortgage documents. But what else the scheme included is shrouded in mystery. (*Supra*, pp. 6-7.)

Moreover, the generic nature of the crime is likewise obscure. In Maryland there are two kinds of criminal conspiracy—those with wrongful objectives and those which contemplate the use of wrongful means. To the untutored the dichotomy may not be altogether clear, but that it is firmly established in Maryland law is beyond dispute. The conspiracy here varied like a chameleon. To the trial court and in

the State's brief on appeal, it was sometimes one, sometimes the other, never both. Then it turned out, according to the Court of Appeals, to be both. (*Supra*, pp. 5-6, 9-10.)

1. Even the majority of the Court of Appeals thought that the trial court was wrong in denying the motions for particulars. But it held that the denial was not prejudicial because the defendants had introduced evidence "aimed at rebutting and refuting" testimony introduced by the State. (*Supra*, p. 10.) The holding below thus establishes the unique principle that defendants are adequately informed of the accusation against them because they hear the State's testimony before they put on their own case.

It is manifestly impossible to have a fair trial if the issues, instead of being defined in advance by a separate statement, emerge from the evidence introduced by the prosecution during the trial in bits and pieces. The defense does not know what evidence it should object to for irrelevancy, and the court does not know what evidence should be excluded. Defense counsel cannot tell if his understanding of the issues, derived from analysis of the prosecution testimony, corresponds to the intentions of the State or the views of the court. The defense cannot assemble its witnesses and evidence before trial, but must hunt up its evidence during the nights of the trial days. The prosecution is left "free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." *Russell* v. *United States*, 369 U.S. 749, 768. The inevitable result is the kind of shambles that occurred in this case (*supra*, pp. 7-8). It is kinder to condemn people without trial than to subject them to such an illusion of trial, considering that the result is bound to be the same.

CONCLUSION

Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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